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Nos. 85-1253 and 85-1288

IN THE

Supreme Court of the United States

October Term, 1985

EAGLE-PICHER INDUSTRIES, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

RAYMARK INDUSTRIES, INC., et al.,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
The Petitioners' Third-Party Claims Against the United States are Clearly Viable Under the Applicable Substantive Law.....	1
The Government Misconstrues the Executive Jet "Nexus" Requirement for Admiralty Jurisdiction When it Asserts that the Injury Sustained Must Bear Some Relationship to Traditional Admiralty Concerns.....	10
Conclusion.....	16
Certificate of Service.....	19

TABLE OF AUTHORITIES

CASES	Page
Bedell v. Reagan, 159 Me. 292, 192 A. 2d 24 (1963).....	5
Boober v. Bicknell, 135 Me. 153, 154, 191 A 275-76 (1937).....	2
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).....	15
Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982).....	15
Hurd v. Hurd, 423 A. 2d 960, 962 (Me. 1981).....	2
Kimball v. Clark, 133 Me. 263, 266, 177 A. 183, 184 (1935).....	2
Lockheed Aircraft Corp. v. United States 460 U.S. 190 (1983).....	8
McKellar v. Clark Equipment Co., 472 A. 2d 411 (Me. 1984).....	6
Otis Elevator Co. v. F.W. Cunningham & Sons, 454 A. 2d 335 (Me. 1983).....	5, 7
Roberts v. American Chain & Cable Co., 259 A. 2d 43 (Me. 1969).....	6

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981)..... 14, 15

Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963)..... 8

STATUTES AND LAWS

5 U.S.C. § 8116(c)..... 5, 8

33 U.S.C. § 905(a)..... 4

39 M.R.S.A. § 4..... 6, 7

THE PETITIONERS' THIRD-PARTY CLAIMS AGAINST THE UNITED STATES ARE CLEARLY VIABLE UNDER THE APPLICABLE SUBSTANTIVE LAW

In its Brief in Opposition the Government maintains that Petitioners have identified no substantive law basis for their third-party claims against the United States in its capacity as owner and operator of the shipyard at which the various plaintiffs worked. (Brief in Opp. at 11 through 12). The Government goes on to imply that this alleged failure of the Petitioners to establish a substantive basis for their claims was one reason for the lower courts holding dismissing those claims.

One is astounded to encounter such an argument at this stage of judicial proceedings. It is well settled in Maine law that an employer owes all employees the duty of furnishing a safe place to work and of warning employees of dangers

which may be encountered in the work place. Boober v. Bicknell, 135 Me. 153, 154, 191 A. 275-76 (1937); Kimball v. Clark, 133 Me. 263, 266, 177 A. 183, 184 (1935); and Hurd v. Hurd, 423 A. 2d 960, 962 (Me. 1981). If the employer breaches these duties he may be found liable for the injuries sustained by the employee under traditional principles of negligence law. Hurd v. Hurd, supra at 962 and n. 3. In the instant case the claims against the United States are based precisely on the breaches of these duties; specifically, the failure to eliminate the asbestos dust hazard at the Portsmouth Naval Shipyard or to warn the employees of the existence of this hazard.

Because Maine law clearly provides a substantive basis for tort claims against

employers for damages sustained by an employee, the question before the lower court was not whether the United States could be liable in negligence or under some other theory, but rather whether the United States as employer would have valid and complete defenses to the third-party claims for contribution and/or indemnity. Thus, the entire focus of the opinion below is whether the United States may assert as a defense to an admittedly viable claim the so-called employer immunity defenses of the Longshore and Harbor Workers' Compensation Act (LHWCA) and of the Maine Workers' Compensation Act (MWCA). The holding of the lower court is simply that these defenses are available to the United States and are, under the

circumstances, complete defenses.[1] There is no hint anywhere in the lower court's opinion that the third-party claims lack a basis in substantive law. Indeed it is the very viability of the claims that forced the lower court to rule on whether the workers' compensation defenses available under the LHWCA and the MWCA could be asserted against them by the United States.

The only substantive law issue even remotely related to the viability of Petitioners' third-party claims is the so-called joint liability requirement for a contribution claim against a third-party defendant. The argument advanced by the

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[1] The text of the holding is as follows:
"We hold that these land-based third-party claims are barred by § 4 of the Maine Workers' Compensation Act and 33 U.S.C. § 905(a)." (Pet. App. 22a).

Government below and again in its Brief in Opposition is that the United States cannot be liable on a contribution claim to a third-party plaintiff because it bears no liability directly to the plaintiff/employee under the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c). (Brief in Opp. at 13 and n. 12) There is, however, no joint liability requirement for a contribution claim under Maine law. Bedell v. Reagan, 159 Me. 292, 192 A. 2d 24 (1963); and Otis Elevator Co. v. F. W. Cunningham & Sons, 454 A. 2d 335 (Me. 1983). Although the Government accepts, as it must, this rule of Maine law, it nonetheless claims that Petitioners mislead the court when they cite the pertinent cases. (Brief in Opp. at 13 and n. 12). With due respect, it is the Government who misleads when it asserts that joint liability is still

required under Maine Law when contribution is sought from an employer. (Brief in Opp. at 13 and n. 12).

The cases cited by the Government, McKellar v. Clark Equipment Co., 472 A. 2d 411 (Me. 1984); and Roberts v. American Chain & Cable Co., 259 A. 2d 43 (Me. 1969), do not address the law of contribution. These two cases focus exclusively on the meaning of 39 M.R.S.A. § 4, Maine's employer immunity statute, and the policy considerations supporting its enactment. In Maine contribution against an employer is not barred by reason of any joint liability requirement, and the state's highest court has explicitly so stated in explaining its decision in the Roberts Case: "Although this court did not allow contribution from an assenting employer, it did not base its decision on the

'common liability rule.'" Otis Elevator Co. v. F. W. Cunningham & Sons, supra at 338.

Under Maine law, contribution is barred by the employer immunity statute itself. Section 4, however, is vastly different from § 8116(c) of the FECA. This can be established by even a quick comparison of the text of the two statutes.

> An employer who has secured the payment of compensation in conformity with Sections 21-A to 27 is exempt from civil actions, either at common law or under Sections 141 to 148, Title 14, Sections 101 to 8118, and Title 18-A, Section 2-804, involving personal injuries sustained by an employee arising out of and in the course of his employment, or for deaths resulting from those injuries. 39 M.R.S.A. § 4.

> The liability of the United States...with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States ... to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United

> States ... because of the injury or death .... 5 U.S.C. § 8116(c).

Thus, under Maine law, the employer is simply exempt from all civil actions in any way related to the injury or death of an employee. Under § 8116(c), however, only the United States' liability to the employee or to his dependents is extinguished. Accordingly, this Court has always held that under the FECA the United States bears some liability for the injuries sustained by an employee when it is sued by someone other than the employee or one of his dependents. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963); and Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

In summary, then, it is apparent that the Petitioners' third-party claims are valid under the substantive law of Maine. The issue for review is exactly

that as framed by the Petitioners - is the United States as employer entitled to assert an employer immunity defense other than that specifically provided to it by Congress in the FECA? If the United States is limited to its FECA immunity, then the lower court has erred in dismissing the third-party claims on the basis of the immunities found in the LHWCA and the MWCA.

The importance of resolving the issue framed by the Petitioners cannot be contested by the Government. Prior to this Court's decision in Lockheed there is not so much as a hint in any case that the nature and extent of the United States' immunity as employer is governed by compensation acts designed by state legislatures in response to local political pressures or by Congress in response to the particular needs of the

marine related industries subject to the LHWCA. The instant case is but one in a growing body of precedent wherein § 8116(c) is treated as meaningless or redundant on the very issue it addresses; namely, the immunity of the United States as employer for injuries sustained by one of its employees.

THE GOVERNMENT MISCONSTRUES THE EXECUTIVE JET "NEXUS" REQUIREMENT FOR ADMIRALITY JURISDICTION WHEN IT ASSERTS THAT THE INJURY SUSTAINED MUST BEAR SOME RELATIONSHIP TO TRADITIONAL ADMIRALTY CONCERNS

In its Brief in Opposition the Government repeatedly asserts that admiralty jurisdiction is inappropriate for the claims against the United States as vessel owner because there is a need for uniform treatment of all victims of asbestos-related disease. (Brief in Opp. at 23 through 25) This disingenuous proposition finds no support in any case

discussing the scope or purposes of admiralty jurisdiction and little support in the lower court's decisions. It is tantamount to claiming that the victims of falling cargo during the unloading of a ship should have no access to maritime remedies because other workers injured by falling cargo from a railroad car cannot bring a maritime cause of action.

The lower court acknowledged that there is nothing about asbestos-related diseases per se that renders a case involving these diseases non-maritime. (Pet. App. 92a n. 8). In short, in the eyes of the lower court, the type of injury sustained is of no moment. Contrary to the Government's suggestion the law quite properly treats a broken leg caused in a ship collision differently from a broken leg caused in an automobile collision, and the

occupation of the injured person would make no difference. By the same token, the law should treat asbestos-related diseases caused by vessel owner negligence during the construction or overhaul of a ship in navigable waters differently from the same diseases caused in building construction or renovation even though the nature of the injury sustained is the same. It is the identity of the victim, here a ship repairman, and the relationship of his activities to traditional maritime concerns and the identity of the tortfeasor, here a vessel owner, and the relationship of his activities to traditional maritime concerns that govern.

How asbestos-related diseases become "land-based problems ... [not] intrinsic to the condition of a vessel" (Brief in Opp. at 24 n. 23) as asserted by the

Government remains a mystery. It is no mere coincidence that the vast majority of asbestos cases filed in the District of Maine are brought by shipyard workers, a majority of whom worked at the Portsmouth Naval Shipyard. In these cases most of the workers' exposure to airborne asbestos dust occurred on board ship, and most of this shipboard exposure occurred during the removal or rip-out of asbestos products from the pipes, boilers, and machinery of the ships themselves. Thus, the causes of the asbestos diseases at issue are intimately connected to traditional maritime concerns and to the dangerous conditions of the vessels themselves.

The Government misconstrues the importance and unprecedented nature of the decision below in attempting to reduce the issue raised by the lower

court's decision to whether diseases resulting from asbestos exposure are "admiralty concerns" (Brief in Opp. at 24). Neither asbestos-related injuries nor any class of injuries are "admiralty concerns". Presumably, virtually any malady may befall a man or woman whether on land or at sea. Asbestos is simply the medical cause of the injury, and for analytical purposes it is indistinguishable from gases, toxic fumes, high-pressure steam, or any number of potentially harmful substances which, like asbestos, may be found on vessels in navigation and at industrial sites on land. What is an "admiralty concern", however, is a disease or injury that is caused by vessel owner negligence. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981).

To ask, as the Government does, why

the conduct of the vessel owner in causing an asbestos-related injury should be judged by the standards set by maritime law is to question the very basis for the grant of admiralty jurisdiction to the federal courts. This Court has always stressed the need for national uniformity in laws affecting maritime affairs. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); and Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982). Uniformity means that no state can impose a greater duty of care on a vessel owner, such as strict liability for all shipboard injuries, to please local labor unions, or impose a lesser duty of care to lure more business to its ports for cargo operations, vessel construction, or vessel repair. As this Court noted in Scindia Steam Navigation Co., Ltd. v. De

Los Santos, supra, the duties of the vessel owner to maritime workers onboard are determined as a matter of federal, not state, law. Id. at 166 n. 13. There is no precedent for making exceptions to this rule on the basis of what type of injury the vessel owner's negligence caused. Were it otherwise the law maritime would vary from state to state and vary again depending on the type of injury sustained.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I, Benjamin Thompson, Esq., certify that on the 5th day of May, 1986, I mailed, postage prepaid, forty (40) copies of the Petitioners' Reply To Brief In Opposition to the Clerk of the Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543, and mailed three (3) copies, postage prepaid, to each of the following counsel of record:

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